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Opinion Committee

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May 15, 1997

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The Honorable Dan Morales  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-39566-97

I.D. # 39566

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MAY 19 1997

OPEN RECORDS DIVISION

Re: Request for Opinion

Dear Honorable General Morales:

I request your opinion for Denton County concerning: 1) the proper interpretation and application of the Texas Constitution Article 3, Section 52 and Article 11, Sections 5 and 7 and "save and hold harmless" clauses in contracts with Texas governmental entities and 2) the method by which to prevent the voiding of a contract caused by inclusion of said clause.

FACTS

In 1996, the U.S. Army Corps of Engineers (hereinafter "Corps") proposed a contract to Denton County (hereinafter "County") known as COOPERATIVE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND DENTON COUNTY, TEXAS FOR THE PROVISION OF ADDITIONAL LAW ENFORCEMENT SERVICES. *See Exhibit "A"*. A part of the agreement was a "Plan of Operation". *See Exhibit "B"*. The contract provides for additional law enforcement personnel from Denton County on Lake Lewisville during the summer months. The personnel, deputies from the Denton County Sheriff's Department, will perform their statutory duties on Corps property. The Corps will pay the deputies to increase patrol on Corps property.

In previous years, Denton County executed the Plan of Operation, Exhibit "B", only. The Cooperative Agreement, Exhibit "A", was not presented to, nor previously executed by, Denton County. Exhibit "A" of the documents presented in 1996, includes Article 8, Release of Claim, which states:

*The Cooperator [Denton County] agrees to hold and save the Corps, its officers, agents or employees, harmless from liability of any nature or kind, for or on account of any claims for damages that may arise during the performance of the law enforcement services by the Cooperator under this agreement.*

The County interpreted the above Release of Claim provision to have the legal effect of creating a debt, stating:

*This provision has the legal effect of creating a debt by obligating Denton County to hold the Corps harmless from liability of any nature or kind for damages that might arise from the performance of law enforcement services by the County. Constitutional prohibitions preclude the County from agreeing to this term in the agreement.*

See letter dated March 20, 1996, to Mr. Kenneth Howell, Exhibit "C". Denton County proposed a modification to the contract:

*I propose to resolve the issue in one of two ways. One, Article 8 can be deleted. The parties can strike through the paragraph and initial the strike through. Two, insert the following language at the beginning of the paragraph: "To the extent permitted by law, . . ." and the parties can initial the change.*

*Upon resolution of this issue, this office is prepared to recommend approval of the agreement. Please let me know which of the two options you prefer.*

See Exhibit "C"

The Office of Counsel for the Corps responded by letter dated March 27, 1996. The Office of Counsel for the Corps stated several beliefs:

- (1) The Texas Constitution, Article 3, Section 52 (a) referring to debt creation would not apply because the Corps as agency of the Federal Government was not an individual, association, or corporation;

(2) 23 other counties and municipalities signed an agreement containing this language and this same language was used in an agreement with Denton County the previous year;

(3) Denton County's law enforcement officials would only be enforcing the law on Corps property as they already did there and elsewhere in the County; and

(4) The release language used was mandated by nationwide regulation.

*See Exhibit "D".*

### DISCUSSION

The County's response to the Corps' position above is as follows. First, Article 3, Section 52 (a), cited by the Corps, does not pertain to this discussion because the County's concern arises out of Art. 11 § 7 of the Texas Constitution. Second, the Corps' belief that the parties signed the same contract the year before is incorrect. Denton County only signed the Plan of Operation previously and the proper interpretation of the law is not controlled by what counties and cities have done previously. Third, deputies would provide the same type of law enforcement the County normally provides; no new or expanded duties are required. Fourth, the Corps has not agreed to change its contract as requested by Denton County.

The County's position is consistent with Texas & New Orleans R.R. v. Galveston County, 141 Tex. 34, 169 S.W.2d 713 (Tex. 1943) and subsequent Attorney General's Opinions. The Texas Commission of Appeals found that the contract stating "County will indemnify and save harmless each of the other parties" would fix a debt without proper provision for payment in violation of Art. 11 § 7 of the Constitution of Texas. Id.

In Brown v. Jefferson County, 406 S.W.2d 185, 188 (Tex. 1966), the Texas Supreme Court concluded that the Texas & New Orleans R.R. case above should be restricted to its essential holding, namely, that an indemnity agreement is a "debt" within the constitutional sense.

The Brown Court stated the Court in Texas & New Orleans R.R. had been highly critical of the provisions in the Galveston County contract, but the opinion should not be construed as condemning all county indemnity contracts. Brown at 188. The Court discussed the length of time for the liability, the control the county had over the position, whether the action was a legitimate county function, and the fact the federal government required this language in innumerable agreements providing money for local interests. In the Brown

case, the time was assumed to be around two years for the construction of the bridge, the county was to control the bridge and assume ownership, a bridge was a legitimate county function, and the federal government was giving the county most of the money to build the bridge.

The liability in Denton County's case would be for actions occurring during the summer by County employees, acting in their normal functions as peace officers, and with funding by the federal government allowing the County to have more law enforcement officers working.

The main difference in the present situation and Jefferson County's situation is the Jefferson Commissioners Court provided for a tax to pay interest on any debt incurred as a result of the agreement and for a sinking fund for each year while there was liability by reason of the agreement. Brown at 188.

Therefore, based on the foregoing, Denton County and any of the 23 county and municipal governments mentioned above would be creating a void agreement under Article XI, Section 7, of the Texas Constitution, if the debt consideration is not addressed.

Denton County desires to enter into the attached agreement *marked Exhibit "A" & "B"* if it can be done legally with a valid contract.

Does authority exist to permit the County to enter into the agreement with the "hold and save harmless" provision?

Can the County create a valid contract by an addendum to the contract providing the County will pay obligations incurred by a tax sufficient to pay the interest and provide a sinking fund for the obligation incurred?

Please advise if additional information is required in rendering your opinion. Thank you for your consideration in this matter.

Sincerely,

  
Bruce Isaacks

#### Attachments

pc: Denton County Commissioners Court, w/o attachments  
Hon. Weldon Lucas, Denton County Sheriff, w/o attachments